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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Competitive Telecommunications Association,)
Florida Competitive Carriers Association, and)
Southeastern Competitive Carriers Association)
)
Petition on Defining Certain Incumbent LEC)
Affiliates as Successors, Assigns, or)
Comparable Carriers Under Section 251(h))
of the Communications Act)

CC Docket No. 98-39

REPLY COMMENTS OF CABLE & WIRELESS, INC.

Cable & Wireless, Inc. ("CWI"), by its attorneys and pursuant to Public Notice DA 98-627, released April 1, 1998, hereby submits these reply comments in support of the above-captioned petition ("Petition") filed on March 28, 1998 by the Competitive Telecommunications Association, the Florida Competitive Carriers Association, and the Southeastern Competitive Carriers Association (collectively, the "Joint Petitioners"). In support of these reply comments, the following is respectfully shown:

INTRODUCTION

CWI strongly urges the Commission to take the opportunity presented by the Petition to exercise its authority to address the regulatory status of ILEC "affiliates" established within the ILEC's territory that function as competitive local exchange carriers ("CLECs"). Use of these CLEC affiliates could allow the ILECs to evade the resale, interconnection, and unbundling

requirements of Sections 251 and 252 of the Act, thereby eviscerating the pro-competitive mandates of the Telecommunications Act of 1996. Unless the Commission acts expeditiously to deal with this serious potential problem, the ILECs easily in this way could manipulate the deregulatory local environment created by the 1996 Act, thereby securing their monopolistic holds on the local markets and achieving comparable positions in the long distance market.

The Joint Petitioners seek a declaratory ruling that an affiliate of an ILEC that operates under the same or a similar brand name and provides wireline local exchange or exchange access services within the ILEC's region will be considered a "successor or assign" of the ILEC under Section 251(h)(1)(B)(ii) of the Communications Act, and hence should be subject to all obligations applicable to ILECs under Section 251(c) of the Act.¹ Alternatively, the Joint Petitioners request that the Commission propose a rule establishing a rebuttable presumption that an ILEC affiliate providing wireline local exchange or exchange access services within the ILEC's service area qualifies as a "comparable carrier" under Section 251(h)(2) of the Act, and thus is subject to Section 251(c).² CWI respectfully submits that the FCC should exercise its authority to adopt either of these two approaches, each of which would be an effective means of dealing with the possible abuses detailed in the Petition and supporting comments.

¹ Petition at 8-13.

² Petition at 13-15.

I. THE FCC SHOULD ACT EXPEDITIOUSLY TO CLARIFY THE REGULATORY STATUS OF IN-REGION ILEC AFFILIATES OPERATING AS CLECS TO ENSURE THE GROWTH OF COMPETITION IN THE LOCAL MARKETS.

In the Petition and many of the initial comments filed in this proceeding, a variety of CLECs, interexchange carriers ("IXCs"), telecommunications trade associations, and even some ILECs discuss with concern the relatively new trend of the establishment by ILECs of affiliated "competitive" LECs that provide local exchange and other telecommunications services (and, eventually, long distance services) in the ILECs' territory.³ As the Joint Petitioners and commenters quite correctly indicate, the establishment of these "competitive" local exchange carriers could allow the ILECs to evade the local competition obligations imposed upon them as ILECs by the Communications Act.⁴

The establishment of these so-called CLECs facilitates a wide variety of potential anticompetitive strategies that would benefit both the ILEC and the affiliate CLEC, and, ultimately, the ILEC parent company, at the expense of true CLECs and the growth of competition generally in the local markets. Unless the Commission takes preventative measures, ILECs could, for example, use the affiliate CLEC to offer new services without being required, as would the ILEC, to make those services available for resale at a wholesale discount or to make the network elements used to provide those services available on an unbundled basis. Similarly,

³ See, e.g., AT&T Comments at 2; ALTS Comments at 2; e.spire Comments at 1-2; Frontier Comments at 2-3; Intermedia Comments at 3-5; KMC Comments at 2; ICG Comments at 4;; LCI Comments at 2-3; MCI Comments at 3-5; Sprint Comments at 3-5; TCG Comments at 1-2; WorldCom Comments at 2-3; TRA Comments at 4-7.

⁴ See, e.g., e.spire Comments at 9; ICG Comments at 8; LCI Comments at 5; MCI Comments at 6; TCG Comments at 2-3; WorldCom Comments at 2-3.

the ILEC could use the CLEC to offer special discounted rate plans for existing services, thereby avoiding the requirement to offer those plans to other CLECs at wholesale rates. Indeed, the Joint Petitioners indicate that BellSouth Telecommunications appears to be using BellSouth-BSE for just such purposes, and, as a result, thus far successfully has sidestepped various Section 251(c) obligations.⁵ Further, it would appear that Ameritech has been engaging in similar behavior with a "CLEC" affiliate.⁶

The probable effect of such behavior will be to stifle competition in the local markets. New entrants into the local exchange market will not be able to compete effectively against the ILECs and their CLEC affiliates, which together effectively would be operating as a single entity to exploit the benefits of incumbency. Like many other IXC's, CWI will be obliged to rely on the resale of ILEC services and unbundled network elements in order to compete effectively. However, as many commenters note, the uncertainty of the compliance of ILECs and their affiliates with their Section 251(c) obligations to provide these essential services and facilities on a nondiscriminatory basis and at wholesale rates is creating massive disincentives for IXC entry into the local market.⁷ If the Commission does not act to curtail these potential unlawful practices, resale as a strategy for entry into the local markets effectively will be eliminated.

⁵ Petition at 4-7.

⁶ See, e.g., TCG Comments at 4, e.spire Comments at 2, n.3.

⁷ See, e.g., AT&T Comments at 2; e.spire Comments at 6.

II. THE FCC HAS THE AUTHORITY TO RULE THAT IN-REGION ILEC AFFILIATES ARE PRESUMPTIVELY SUBJECT TO ALL ILEC OBLIGATIONS IMPOSED BY THE COMMUNICATIONS ACT.

CWI agrees with the Joint Petitioners and supporting commenters that certain ILEC affiliates providing in-region local service are subject to all relevant obligations imposed on ILECs by the Communications Act -- including Section 251(c) -- and the Commission's Rules.⁸ Section 251(h)(1) of the Act expressly defines as an ILEC any person or entity that, on or after the date of enactment, "became a successor or assign" of an ILEC that provided exchange service in a region on that date and was a member of the National Exchange Carrier Association.⁹

An affiliated entity is clearly a "successor" of the ILEC when it uses the same resources as the ILEC -- including a shared name, financial and human resources, and facilities -- and provides substantially similar local services in the ILEC's territory, particularly when providing services to former customers of the ILEC. In such cases the affiliate is functioning as the ILEC, and hence, in every sense of the word, is operating as the ILEC's successor. For the same reasons -- that is, because the ILEC has transferred or "assigned" to the affiliate these significant attributes -- the affiliate must also be considered an "assign" of the ILEC.

The simple truth is that ILEC affiliates such as BellSouth BSE are *in fact* functioning as successors and assigns of the ILECs, as the Joint Petitioners demonstrated in detail in their Petition and as many commenters have reiterated. Indeed, the Commission has already recognized and expressly disallowed similar uses of affiliates by ILECs when the agency found

⁸ See, e.g., Petition at 8-13; e.spire Comments at 3; Intermedia Comments at 5; KMC Comments at 3; LCI Comments at 6; TCG Comments at 2; WorldCom Comments at 8.

⁹ 47 U.S.C. § 251(h)(1).

that it would not allow a BOC to circumvent the nondiscrimination safeguards of Section 272 by transferring local exchange and exchange access facilities and capabilities to an affiliate.¹⁰ A finding that an ILEC affiliate such as BellSouth BSE is a successor or assign of the ILEC is simply a logical next step for the Commission in its quest to ensure that ILECs do not successfully evade their statutory obligations.

Alternatively, if the Commission determines not to issue a declaratory ruling regarding Section 251(h)(1), it should initiate a rulemaking proceeding to establish the criteria under which an ILEC affiliate will be considered a "comparable carrier" under Section 251(h)(2) of the Act and hence will be subject to the obligations of Section 251(c). The Communications Act provides that the Commission may treat a LEC as an ILEC if: (1) the LEC "occupies a position in the market for telephone exchange service within an area that is comparable to" the ILEC; (2) the LEC has "substantially replaced" the ILEC; and (3) treatment of the LEC as an ILEC is consistent with "the public interest, convenience, and necessity."¹¹

CWI supports the Joint Petitions' position that, consistent with Section 251(h)(2), an ILEC affiliate should be treated by rule as an ILEC "if it provides local service in the same geographic area as the ILEC and if the ILEC has transferred anything of value, including brand names, financial resources, or human capital, to the affiliate."¹² As discussed above, such an affiliate, allied with the ILEC, occupies a position in the market that is not only comparable to,

¹⁰ See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (subsequent history omitted).

¹¹ 47 U.S.C. § 251(h)(2).

¹² Petition at 13.

but, rather, is virtually identical to that of its ILEC affiliate. Further, particularly with regard to shared customers, the affiliate clearly has replaced the ILEC in its provision of certain services. Finally, because the ILECs easily could use these affiliates to escape the local competition provisions of the Communications Act, the pro-competitive mandates of the Act will only be realized, and, correspondingly, the public interest must be served by, regulation of these affiliates as ILECs.

In sum, if an ILEC transfers to a CLEC affiliate network elements or other essential facilities, financial or human resources, and any other vestigial appurtenances of monopolistic incumbency, the FCC should determine, either through the means of a declaratory ruling or a rulemaking proceeding, that the affiliate is a successor, assign, or “comparable carrier” to the ILEC, and is subject to corresponding ILEC obligations under the Communications Act.

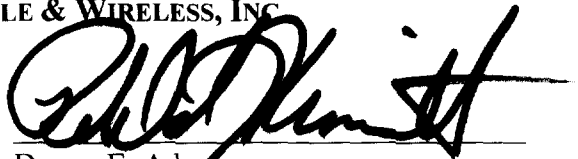
CONCLUSION

For the foregoing reasons, the Commission should find that an affiliate of an ILEC that provides local exchange services in the ILEC's territory, under the same or a similar brand name, is subject to the requirements of Section 251(c), either as a successor or assign, or as a "comparable carrier" within the meaning of Section 251(h).

Respectfully submitted,

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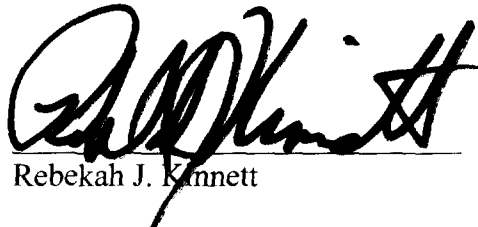
I hereby certify that copies of the foregoing were served this 18th day of May, 1998 by hand or by first-class mail, postage prepaid, on the following:

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